

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

MOTION TO STRIKE OR LIMIT THE TESTIMONY OF DR. INDRAJEET CHAUBEY

Defendants respectfully move the Court for an order excluding or limiting the testimony of Dr. Indrajeet Chaubey.¹ The State has announced their intention to call Dr. Chaubey to testify on Monday, November 23, 2009. Dr. Chaubey's testimony should be excluded because he has not served an expert report in this matter as required by Rule 26. Fed. R. Civ. P. 26(a)(2). The State will contend that Dr. Chaubey is a "non-retained" expert exempt from that requirement. But in fact Dr. Chaubey is singularly associated with the State and its experts, and will be offering opinions developed in concert with them for this litigation. Dr. Chaubey's testimony should also be excluded as cumulative of the State's many other fact and expert witnesses. Finally, to the extent that Dr. Chaubey is permitted to testify, his testimony must be limited to opinions developed in work relevant to the facts of this case but prior to and independent of this litigation.

¹ Defendants recognize the Court's admonishment regarding filings during trial. However, this issue arises over the weekend when the parties are not in court, and in order to allow the State time to respond and to allow the Court to consider the issue prior to Dr. Chaubey taking the stand on Monday, Defendants raise the issue in this written motion. Defendants respectfully seek leave to to file this motion.

I. Dr. Chaubey's Testimony Should be Excluded For Failure To Submit A Rule 26 Expert Report

Rule 26 requires a party to serve in advance of trial a written report on behalf of any witness who has been “*retained or specially employed* to provide expert testimony in the case.” Fed. R. Civ. P. 26(a)(2)(B). That report should include *inter alia* a complete statement of the expert’s opinions, and the bases, data, and exhibits supporting them. *Id.* The State will argue that Dr. Chaubey is a “non-retained” expert who need not file an expert report. However, Rule 26 separately covers both witnesses who are “retained” (*i.e.* paid) or “specially employed” (*i.e.* otherwise purposefully solicited). *Id.*; *see also B.H. v. Gold Fields Mining Corp.*, 2007 WL 128224, at *3-4 (N.D. Okla. Jan. 11, 2007). Whether an expert was “specially employed” turns in part on “the nature of [the expert’s] proposed testimony.” *Id.* at *10; accord *Wreath v. United States*, 161 F.R.D. 448, 450 (D. Kan. 1995); *Trejo v. Franklin*, 2007 U.S. Dist. LEXIS 54970, at **4-5 (D. Colo. July 30, 2007). It turns also on the manner of the relationship between the expert and the party soliciting the testimony. *See B.H.*, 128224, at *11-12; *Kirkham v. Societe Air France*, 236 F.R.D. 9, 12-13 (D.D.C. 2006).

The fact of the matter here is that, despite not being compensated for his testimony, Dr. Chaubey is far from an accidental tourist in this litigation. Quite the contrary, Dr. Chaubey is singularly identified with Plaintiff. Dr. Chaubey is a faculty member at Purdue University where he is a member of the Department of Agricultural and Biological Engineering and reports to Dr. Bernard Engel. *See* Ex. 1 (Chaubey Depo) at 34:9-35:9; 204:16-24. As the Court heard on Thursday, Dr. Engel chairs that Department, and indeed his hiatus from the witness chair next week is occasioned by his need to be at Purdue to vote on faculty promotions. *See* Ex. 2 (Trial Tr.) at 5632:9-21. As the attached e-mail demonstrates, it was Dr. Engel who solicited Dr.

Chaubey's testimony for this case, and who arranged for him to meet with counsel for the State well after the deadline for expert disclosures had passed. *See* Ex. 4.

Dr. Chaubey met with Plaintiff's counsel on at least two occasions prior to being deposed, at which meetings they discussed the potential substance of his testimony. Ex. 1 at 200:9-216:16. Plaintiff then funded Dr. Chaubey's participation in a deposition that they themselves noticed and where, as Defendants objected at the time, they elicited trial-type testimony on a wide-ranging array of expert opinions that well exceeded the scope of any work Dr. Chaubey had done previously in the Illinois River Watershed. *See id.* at 34:9-35:9; 207:17-208:13. As Dr. Chaubey candidly admitted at his deposition he has a professional interest in this litigation. Ex. 1 at 204:13-15. Rule 26 must apply to such a witness. Otherwise, it would be too easy in environmental litigation for a party to secure "non-retained expert" testimony from motivated individuals with a professional, academic, or political interest in the outcome of the litigation, but without the pre-trial disclosure and discovery required by Rule 26. Here, the Plaintiff will seek to elicit from Dr. Chaubey expert opinions developed for the first time as part of this litigation that have never been disclosed in a Rule 26 report and therefore never subjected to cross examination. Moreover, that testimony was solicited through Dr. Chaubey's close relationship with one of Plaintiff's key expert witnesses, which taints his testimony generally. The resulting prejudice to Defendants is manifest and unjust. Dr. Chaubey's testimony should be excluded.

II. Dr. Chaubey's Testimony Should be Excluded As Cumulative

Dr. Chaubey's testimony should also be excluded because the subject matter to which he can testify would be cumulative of Plaintiff's many other expert and governmental witnesses. On April 1, 2008, the State identified Dr. Chaubey as a potential non-retained expert who might

testify to “ecological engineering, nonpoint source pollution, water quality, modeling, and GIS and remote sensing.” *See* Ex. 3 at 4 (letter from Mr. Bullock to defense counsel identifying expert witnesses).² Each of these subjects is amply addressed by the parade of expert and governmental witnesses to whom the Court has already been treated. The State’s 72-hour disclosures indicate their intention to have Dr. Chaubey testify to subjects such as mass balance calculations (by someone other than himself), runoff processes (*i.e.* water runs downhill), and best management practices (*e.g.* buffer strips). To the extent that Dr. Chaubey has specific factual observations to share regarding the IRW, or expert opinions within these disclosed areas, they are cumulative and unnecessary.

III. Alternatively, Dr. Chaubey’s Testimony Should be Limited to His Own Prior Publications Relevant to the Subject Matter of This Litigation.

As discussed above, Dr. Chaubey’s relationship with Plaintiff should preclude his testimony in full. To the extent that he is permitted to offer any opinions, however, those opinions must be limited to those that are relevant to this litigation, and were generated prior to and independent of this litigation. At his deposition, noticed and conducted by Plaintiff, Dr. Chaubey offered a swath of expert opinions specific to this case but never previously disclosed in his published writings independent of this lawsuit. *See Defendants’ Joint Motion in Limine to Preclude Opinion Testimony by Non-Retained Experts*, No. 2435, at 1-3 (Aug. 5, 2009) (listing

² In their portion of the pre-trial order listing their trial witnesses (over which Defendants had no control or input), as they did for many other witnesses, Plaintiffs substantially expanded the potential scope of Dr. Chaubey’s testimony to include:

Environmental engineering, pollution sources, environmental mass balance, water quality modeling, animal waste, fate and transport, agronomic rates, phosphorous indices, GIS and remote sensing, best management practices, water quality monitoring, and research

Pre-Trial Order Ex. E at 2. These additional disclosures are tardy and Plaintiffs’ expert witnesses are limited to Plaintiffs’ timely April 1, 2008 disclosure.

new opinions solicited of Dr. Chaubey at his deposition). The disclosures Plaintiff has made in advance of Dr. Chaubey's testimony betray an intention to solicit similar opinions at trial. As the Northern District of Illinois discussed in *Griffith v. N.E. Ill. Regional Commuter R.R. Corp.*, an expert witness ceases to be non-retained when he exceeds the expert opinions associated with his incidental involvement in the case, and begins to form new opinions specifically for the litigation. 233 F.R.D. 513 (N.D. Ill. 2006) (treating physician no longer a non-retained expert when asked to opine as to "causation, prognosis, or future disability" and "going beyond his personal involvement in the facts of the case and giving an opinion formed because there is a lawsuit."). Such opinions are classic expert testimony and in all fairness should be the subject of a Rule 26 report.

CONCLUSION

For the foregoing reasons Dr. Chaubey's testimony should be excluded or limited.

Respectfully submitted,

BY: /s/ Jay T. Jorgensen
 Thomas C. Green
 Mark D. Hopson
 Jay T. Jorgensen
 Gordon D. Todd
 SIDLEY AUSTIN LLP
 1501 K Street, N.W.
 Washington, D.C. 20005-1401
 Telephone: (202) 736-8000
 Facsimile: (202) 736-8711

-and-

Robert W. George
 Vice President & Associate General Counsel
 Tyson Foods, Inc.
 Bryan Burns
 Timothy T. Jones
 2210 West Oaklawn Drive

Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

**ATTORNEYS FOR TYSON FOODS, INC.;
TYSON POULTRY, INC.; TYSON
CHICKEN, INC; AND COBB-VANTRESS,
INC.**

BY: /s/James M. Graves

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

**ATTORNEYS FOR GEORGE'S, INC. AND
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH

PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL
& ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

**ATTORNEYS FOR PETERSON
FARMS, INC.**

BY: /s/ John R. Elrod

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

**ATTORNEYS FOR SIMMONS FOODS,
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN,
REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

**ATTORNEYS FOR CAL-MAINE FARMS,
INC. AND CAL-MAINE FOODS, INC.**

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH
PERMISSION)

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER &
GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

**ATTORNEYS FOR CARGILL, INC. AND
CARGILL TURKEY PRODUCTION, LLC**

CERTIFICATE OF SERVICE

I certify that on the 20th of November, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
-------------------	--------------------

Louis W. Bullock	lbullock@bullock-blakemore.com
------------------	--------------------------------

Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	

COUNSEL FOR PLAINTIFF

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com

Gordon D. Todd
Erik J. Ives
Sidley Austin LLP

gtodd@sidley.com
eives@sidley.com

Robert W. George

robert.george@tyson.com

Michael R. Bond
Erin Walker Thompson
Kutak Rock LLP

michael.bond@kutakrock.com
erin.thompson@kutakrock.com

COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Paul E. Thompson, Jr.
Woody Bassett
Jennifer E. Lloyd
Bassett Law Firm

jgraves@bassettlawfirm.com
pthompson@bassettlawfirm.com
wbassett@bassettlawfirm.com
jlloyd@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
P. Joshua Wisley
Conner & Winters, P.C.

jelrod@cwlaw.com
vbronson@cwlaw.com
jwisley@cwlaw.com

Bruce W. Freeman
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

bfreeman@cwlaw.com

John H. Tucker
Leslie J. Southerland
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com
ljsoutherlandcourts@rhodesokla.com
chtucker@rhodesokla.com
thillcourts@rhodesokla.com

Terry W. West
The West Law Firm

terry@thewesetlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Todd P. Walker
Faegre & Benson LLP

dehrich@faegre.com
bjones@faegre.com
kklee@baegre.com
twalker@faegre.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves
D. Kenyon Williams, Jr.
COUNSEL FOR POULTRY GROWERS

mgraves@hallestill.com
kwilliams@hallestill.com

William B. Federman
Jennifer F. Sherrill
Federman & Sherwood

wfederman@aol.com
jfs@federmanlaw.com

Charles Moulton
Jim DePriest
Office of the Attorney General

charles.moulton@arkansag.gov
jim.depriest@arkansasag.gov

COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

griffithlawoffice@yahoo.com

Gary S. Chilton
Holladay, Chilton & Degiusti, PLLC

gchilton@hcdattorneys.com

Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon, LLP

vschwartz@shb.com
csilverman@shb.com

Robin S. Conrad

rconrad@uschamber.com

National Chamber Litigation Center, Inc.

**COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND
THE AMERICAN TORT REFORM ASSOCIATION**

Richard C. Ford
LeAnne Burnett
Crowe & Dunlevy

fordr@crowedunlevy.com
burnettl@crowedunlevy.com

COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins
McAfee & Taft

richard.mullins@mcafeetaft.com

James D. Bradbury
James D. Bradbury, PLLC

jim@bradburycounsel.com

**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE
FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS
ASSOCIATION OF DAIRYMEN**

I also hereby certify that I served the attached documents by United States Postal Service,
proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
**COUNSEL FOR THE STATE OF
ARKANSAS AND THE ARKANSAS
NATURAL RESOURCES COMMISSION**

John E. and Virginia W. Adair Family Trust
Route 2 Box 1160
Stilwell, OK 74960

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Cary Silverman
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

Cherrie House
P.O. Box 1097
Stilwell, OK 74960

David Gregory Brown
Lathrop & Gage LC (Jefferson City)
314 E High Street
Jefferson City, MO 65101

Donna S Parker
34996 S 502 Road
Park Hill, OK 74451

Doris Mares
14943 SE 15th Street
Choctaw, OK 73020-7007

G Craig Heffington
20144 W Sixshooter Road
Cookson, OK 74427

George R Stubblefield
HC-66, Box 19-12
Proctor, OK 74457

Gordon W. and Susann Clinton
23605 S Goodnight Lane
Welling, OK 74471

Jerry M Maddux
Selby Connor Maddux Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Jonathan D Orent
Motley Rice LLC (Providence)
321 S Main Street
Providence, RI 02940

Marjorie Garman
19031 US HWY 412
Colcord, OK 74338-3861

Randall E Kahnke
Faegre & Benson (Minneapolis)
90 S 7th Street, Suite 2200
Minneapolis, MN 55402-3901

Richard E Parker
34996 S 502 Road
Park Hill, OK 74451

Robin L. Wofford
Route 2, Box 370
Watts, OK 74964

Steven B Randall
58185 County Road 658
Kansas, OK 74347

Victor E Schwartz
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, D.C. 20005-2004

William House
P.O. Box 1097
Stilwell, OK 74960

/s/ Jay T. Jorgensen